Limits of Coast Guard Authority to Board Foreign Flag Vessels on the High Seas

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The essay addresses the authority of the U.S. Coast Guard to board foreign flag vessels on the high seas when the vessel is suspected of violating a U.S. law that applies extraterritorially. The essay discusses international law constraints, including freedom of navigation concerns, on the Coast Guard's domestic authority, as well as policy implications of such actions.

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Limits of Coast Guard Authority to Board Foreign Flag Vessels on the High Seas

A. Introduction

The United States Congress has granted the U.S. Coast Guard broad law enforcement authority to combat violations of U.S. law that occur in the maritime arena. But what are the limits on the Coast Guard's legal authority to take law enforcement actions on board foreign flag vessels on the high seas, beyond the territory of the United States? Does the Coast Guard, as an agent of the U.S. government, have the authority to board foreign flag vessels on the high seas without the consent of the foreign country where the vessel is registered (flag state) when there are reasonable grounds to believe the vessel and persons on board are engaged in criminal violations of U.S. laws that apply extraterritorially (beyond the territory of the US)? Any answer to that question which would allow U.S. boardings of foreign flag vessels in violation of international law, though not necessarily U.S. law, may have serious implications on U.S. foreign policy. The wrong answer to the question also has the potential to jeopardize long term national security interests of the U.S. in maintaining a high seas regime that regards freedom of navigation as a fundamental foundation of international maritime law.

Recently, an argument has been advanced that U.S. law, specifically, 14 U.S.C. 89(a), authorizes the Coast Guard to take law enforcement actions on foreign flag vessels on the high seas without the consent of the flag state whenever there is a reasonable suspicion that there is a violation of a U.S. law with extraterritorial application.[1] An added twist to this argument is the contention that international law, which would prohibit such boardings in most circumstances,

[1] Two examples of U.S. laws that apply extraterritorially that would most likely be enforced through this means are U.S. laws prohibiting alien smuggling (8 U.S.C. 1324) and narcotic smuggling (46 U.S.C. Appendix 1903).

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does not supersede the Coast Guard's domestic authority in this instance. The argument asserts that neither international treaties, such as the 1958 Convention on the High Seas with its provision granting the flag state exclusive jurisdiction over their vessels on the high seas (except in specific circumstances), nor customary international law[2] (with the same jurisdictional restrictions), overrules the Coast Guard's domestic authority. In essence, this theory argues that the Coast Guard is not constrained by the principles of international law when enforcing applicable U.S. law on the high seas. Instead, under this theory, the decision of whether the Coast Guard should use its Congressionally granted authority to board foreign flag vessels on the high seas without flag state consent (and in the absence of circumstances giving rise to one of the exceptions under international law discussed in more detail below) is not a question of law, but rather a question of policy.

B. U.S. Coast Guard's Domestic Authority

The Coast Guard's enforcement of applicable U.S. law on the high seas is governed by both U.S. law and international law. On the domestic side, Congress defined the Coast Guard's law enforcement mission in general terms in 14 U.S.C. 2: "The Coast Guard shall enforce or assist in the enforcement of all applicable federal laws on, under, or over the high seas and water subject to the jurisdiction of the United States. . .." Congress has elaborated on this general statement in 14 U.S.C. 89, specifically articulating the scope of the law enforcement authority granted the Coast Guard. In particular, 14 U.S.C. 89(a) authorizes the Coast Guard to "make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over

[2] Customary international law results from a general consistent practice of states followed by them from a sense of legal obligation. Restatement of the Foreign Relations Law 3d (Restatement 3d), § 102.

which the U.S. has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States."

C. International Law Regime

International law has been characterized as the "law of the international community of states."[3] It serves a valuable function in the international community, "providing restraints against arbitrary state action and guidance in international relations. ... International law is like other law, promoting order, guiding, restraining, regulating behavior. States, the principal addressees of international law, treat it as law, consider themselves bound by it, attend to it with a sense of legal obligation and with concern for the consequences of violation."[4] Even if an act of Congress does supersede international law, the United States is not relieved of its international obligation or of the consequences of violation of that obligation.[5] Thus, the issue of whether the United States is obligated to comply with international law is more than a simple matter of policy.

1. Exclusive Flag State Jurisdiction & Freedom of Navigation

Under customary international law, the 1958 High Seas Convention (HSC) (ratified by the United States), and the 1982 United Nations Convention on the Law of the Sea (LOS) (which the U.S. has not ratified but has indicated serves as a valid statement of customary international law as discussed below), the flag state of a vessel has the exclusive right to exercise legislative and enforcement jurisdiction over its vessels on the high seas.[6] The flag state of a vessel fulfills

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[3] Restatement 3d, Introductory Note, p.16.
[4] Id. at 17.
[5] Restatement 3d, § 115(1)(b); On the other hand, the President, acting within his constitutional authority, may have the authority to disregard international law. See discussion reporter note 3 to Restatement 3d § 115.
[6] This principle is codified in article 6 of the High Seas Convention ("HSC") and article 92 of the LOS. Although specific treaties, such as the 1958 High Seas Convention, only bind those states that are a party to the treaty,

a very important role in international law. The U.S. Supreme Court characterized the role of the flag state saying, "Each state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it."[7] In cases in which a vessel is without nationality (stateless), there is a vacuum created concerning jurisdiction over actions taken by, or which occur upon, that vessel. Customary international law addresses the vacuum by dictating that any state may exert its jurisdiction over stateless vessels. An important corollary to exclusive flag state jurisdiction is freedom of navigation, the concept that vessels of any flag are free to navigate the high seas without interference from other states. As Article 87 of the LOS states, "The high seas are open to all States. . .." The relationship between the two fundamental principles of the high seas regime, exclusive flag state jurisdiction and freedom of navigation, was stated succinctly by the English Privy Council in The Asya.[8] In that case, a vessel showing false colors (the vessel flew a flag belonging to a different state then that in which the vessel was registered) was boarded by a British destroyer. In deciding the case, the Council stated that "a vessel not sailing under the maritime flag of a state enjoys no protection whatever, for the freedom of navigation on the open sea is freedom for such vessels only as sail under the flag of the state."[9]

2. Exceptions to Exclusive Flag State Jurisdiction

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customary international law binds all states unless the state has consistently and conspicuously engaged in a practice contrary to the recognized principle of international law. See Restatement 3d Comment (d) to § 102.; A state has complete sovereignty over its territorial sea (subject to the right of innocent passage) and therefore may exercise jurisdiction over violations of the state's laws in its territorial sea without flag state consent. (art. 1 HSC; art. 2 LOS) A state may also exercise jurisdiction over foreign flag vessels in violation of the state's customs, fiscal, immigration, or sanitary laws the contiguous zone. (art. 24 HSC; arts. 33 LOS) The U.S. claims a contiguous zone (known as customs waters) of twelve miles from the baseline. The high seas are any seas beyond the jurisdiction of a country. (art. 86 LOS)

[7] Laurotzen v. Larsen, 345 U.S. 571, 584 73 S.Ct. 921, 97 L.Ed. 1254 (1953).

[8] The Asya (1948) Ann. Digest 115.

[9] Id. at 124.

There are several universally recognized exceptions to the principle of exclusive flag state jurisdiction. A warship may board a vessel not entitled to immunity[10] and flying the flag of a different state if there are reasonable grounds for suspecting that the vessel is engaged in piracy, the slave trade, or unauthorized broadcasting (provided certain restrictions are met).[11] Additionally the vessel may be boarded if the vessel is without nationality ("stateless") or, although flying the flag of another state, the vessel is the same nationality as the warship.[12] As a warship's authority to board vessels on the high seas rests on a valid claim of registry by the vessel to be boarded, a warship may board a foreign flag vessel to verify that the vessel is registered in the state where registry is claimed, but the scope of this visit can not exceed the purpose of verifying registry. (HSC art. 22; LOS art. 110) This concept is often termed the "right of visit." Another exception to exclusive flag state jurisdiction is the customary international law right of hot pursuit, which allows a state's warship to pursue a foreign vessel that has violated the state's laws within its territorial seas or internal waters and conduct law enforcement actions on board the vessel on the high seas. (HSC art. 23; LOS art. 111) An extension of this doctrine, constructive presence, gives a state the right to arrest a "mothership" vessel that remains on the high seas, but uses her boats to commit offenses in the territorial sea of the state. There are

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[10] Vessels entitled to immunity under customary international law are warships and vessels owned operated by a State and used only in non-commercial government service. (HSC art. 8,9; LOS art. 95, 96)

[11] See LOS art. 109 for limitations.

[12] In the case of slavery and piracy, the boarding of a foreign flag vessel without the consent of the flag state is allowed based on the concept of universal jurisdiction. Universal jurisdiction allows any state to try and punish individuals involved in a recognized universal crime, no matter where the crime occurred or the nationality of the actors or victims. This is a strong jurisdictional grant of authority and not conferred lightly because, in direct opposition to other grants of jurisdictional authority, no direct connection is needed between the prosecuting state and the offense. According to the Restatement of Foreign Relations, universal jurisdiction is reserved for those crimes which are atrocious in nature, and gives a state the power "to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking aircraft, . . .even when none of the bases for jurisdiction is present." A large number of Coast Guard boardings on the high seas are aimed at combating narcotic smuggling. Interestingly, though there has been a movement to consider trafficking in narcotics as a universal crime, the United States has resisted such efforts. See comment (f) to § 522 Restatement 3d.

additional exceptions that operate during times of war, insurgency, or blockades that relate to the rights of neutrals and belligerents.[13]

D. Legislative History

Those who argue that the Coast Guard has broad powers under the authority of 14 U.S.C. 89 claim that case law and related statutes that existed prior to the 1936 enactment of 14 U.S.C. 89 clearly show that Congress intended to grant the Coast Guard authority to board foreign flag vessels on the high seas without the consent of the flag state. For example, some have found it significant that Congress enacted the closely worded precursor to the current version of 14 U.S.C. 89 in response to the U.S. Supreme Court decision in Maul v. United States.[14] In Maul, Justice Brandeis expressed concern regarding the statutory authority for the Coast Guard to interdict U.S. flag vessels on the high seas. The enactment of 14 U.S.C. 89 was clearly enacted to combat concerns solely regarding the boarding of U.S. vessels. The new legislation was envisioned being a statute that "does not give any new powers at all to the Coast Guard."[15] The House Report explaining the purpose of the bill emphasizes that the aim of the statute was purely U.S. vessels,

> If the officers of revenue cutters [the precursor to the Coast Guard] were without authority to seize American vessels found violating our laws on the high seas. . .or to seize such vessels found there which are known theretofore to have violated our laws without or within those limits, many offenses against our laws might, to that extent, be committed with impunity.[16] (emphasis added)

Additionally, the case law prior to the enactment of 14 U.S.C. 89 clearly shows that in every case where the Coast Guard boarded a foreign flag vessel on the high seas, under international law the

[13] See also Restatement 3d § 522 and discussion following for a description of enforcement jurisdiction over foreign ships on the high seas.
[14] Maul v. United States, 274 U.S. 501, 47 S.Ct. 735, 71 L.Ed. 171 (1927).

U.S. had the authority to board the foreign flag vessel in question on the high seas without the consent of the flag state. These cases involved the rights of neutral and belligerent vessels during war time,[17] slavery,[18] piracy,[19] vessels within the customs waters of the U.S.[20] and vessels construed to be within U.S. waters under the constructive presence doctrine that occurred during the prohibition era.[21] The lack of historical interpretation of 14 U.S.C. 89 to support a finding that Congress intended the Coast Guard to violate international law, coupled with the Supreme Court decision that "an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains,"[22] supports the view that the Coast Guard must abide by the dictates of international law when exercising its authority under 14 U.S.C. 89.

E. Historical U.S. Adherence to International Law

One argument made by those who argue that the Coast Guard has the authority to board foreign flag vessels on the high seas without flag state consent, is that only states that are party to the 1958 High Seas Convention have a right to contest the U.S. boarding of foreign flag vessels without flag state consent.[23] In essence, this theory contends that customary international law,

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[15] Senator Royal Copeland (80 Cong. Record 9165 (1936)).
[16] House Report No. 2452
[17] See, e.g., Church v. Hubbart, 6 U.S. 187 (1804)
[18] See, e.g., U.S. v. La Jeune Eugenie, 26 F. Cas. 832 (C.C.D. Mass. 1822)(No 15551)
[19] See, e.g., Mariana Flora, 24 U.S. 1 (1826)
[20] See, e.g., The Betsy, 3 F. Cas. 303 (C.C.D. Mass. 1818)(No. 1365)
[21] See, e.g., The Grace and Ruby, 283 F. 475 (D. Ma. 1922)(seizure of British vessel four miles off the U.S. coast after it had unloaded liquor to another boat 10 miles off the coast which transported the liquor to shore); United States v. 1,250 Cases of Liquor, 286 F. 260 (S.D.N.Y. 1922, aff'd292 F. 486 (2d Cir.), cert. denied, 263 U.S. 712 (1923) (seizure of foreign vessel and its cargo of contraband liquor 9 miles off the U.S. coast after transfer of liquor onto other boats which transported the liquor to shore).
[22] Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118, 2 L.Ed. 208 (1804).
[23] States party to the LOS would not have this right as the U.S. is not currently a party to the LOS. Note that only nation states and not individuals have the right to contest a violation of international law. The reason why individuals have no standing to contest international law violations was succinctly stated by a U.S. court while denying a defendant's challenge to a Coast Guard law enforcement actions on board a foreign flag vessel; "The international law on which defendants rely is to promote and protect freedom of the seas for nations, not to protect smugglers." U.S. v. Pringle, 751 F.2d 419, 425 (1984).

which allows all states to contest the unauthorized boarding of vessels registered in their state, is not a valid form of law. This is simply not the historic U.S. view. The adherence to customary international law by the United States in the area of the law of the sea is critical to the continuation of a viable international high seas regime. This is especially true both because the United States is not a party to the LOS and because many newly formed states are party to the LOS and not the HSC. Historically, the United States has been a strong supporter of the development of international law, especially the law of the sea. In 1983, President Reagan summarized the reasons for United States leadership in developing this body of law during a speech outlining reasons why the United States would not be signing the LOS:

> The United States has long been a leader in developing customary and conventional law of the sea. Our objectives have consistently been to provide a legal order that will, among other things, facilitate peaceful international uses of the oceans and provide for equitable and effective management and conservation of marine resources. The United States also recognizes that all nations have an interest in these issues.[24]

President Reagan went on in the same speech to characterize the LOS as containing provisions that outlined the "traditional uses of the oceans." The President then enunciated three decisions designed to "promote and protect the oceans interests of the United States." In addition to reaffirming the United States' recognition of a 200 mile fishery conservation zone (renamed an Exclusive Economic Zone (EEZ)) and U.S. recognition of the interests of coastal nations in the waters off their coasts (territorial sea and EEZ), President Reagan emphasized the rights of the United States under customary international law regarding freedom of navigation and overflight on and over the high seas.

> . . .[T]he United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance

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[24] Statement by President Reagan, March 10, 1983 *in* Weekly Compilation of Presidential Documents, Volume 19, Number 10 (March 14, 1983), pp. 383-385. (Reagan Statement)

> of interests reflected in the convention. The United States will not, however, acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses.[25]

In the formal Presidential Proclamation proclaiming the sovereign rights and jurisdiction of the U.S. in the EEZ, President Reagan once again clearly articulated that the United States considered the rights conferred by international law in the maritime arena as binding on all nations. The President stated that the United States would exercise its sovereign rights and jurisdiction within the EEZ "in accordance with the rules of international law," and reaffirmed that all states enjoyed the rights of freedom of navigation in the EEZ "and other internationally lawful uses of the sea."[26] More recently, President Clinton reiterated the traditional U.S. position in forwarding the LOS to the Senate in October, 1994 for ratification by stating that "the general rule of exclusive flag state jurisdiction over vessels on the high seas has long standing in international law."[27]

The advancement of the argument that the U.S., and the Coast Guard in particular, has the authority to board foreign flag vessels on the high seas without flag state consent, has the potential to be extremely damaging to U.S. national security and freedom of navigation rights worldwide. The legal aspects of boarding of foreign flag vessels cannot be easily separated from the policy implications. The Secretary of State has said that "[f]reedom to navigate and operate

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[25] Reagan Statement; President Reagan did say that the announced policy decisions would not affect the application of U.S. law concerning the high seas or existing authority of any U.S. government agency. The Press Secretary statement accompanying the President's statement, though, makes clear that the statement regarding domestic law was referring to the fact that the proclamation did not change existing policy with respect to the outer continental shelf and fisheries within a 200 mile U.S. zone. *Fact Sheet, United States Ocean Policy*, Office of the Press Secretary, The White House, March 10, 1983. The Press Statement also clearly stated the intent of the U.S. to comply with international law in this area. "By proclaiming today a U.S. EEZ and announcing other oceans policy guidelines, the President has demonstrated his commitment to the protection and promotion of U.S. maritime interests in a manner consistent with international law."

[26] Presidential Proclamation 5030 of March 10, 1983, "Exclusive Economic Zone of the United States of America" (48 FR 10605).

[27] Sen. Treaty Doc. 103-39

on, over, and under the high seas is a central requirement of the United States."[28] If the United States decides that it has the authority to board a vessel and take law enforcement actions on the high seas without the consent of the flag state, then the U.S. will have no standing to object if a U.S. registered vessel is boarded and law enforcement actions are taken on board by a foreign state without the U.S. granting consent. This stance would be in sharp contrast from historic U.S. principles, as noted by one court that, "[f]reedom of American vessels from foreign stopping and boarding was a cardinal principle of our early foreign policy. The War of 1812 was fought in large part to vindicate it."[29] The historic right of freedom of navigation would be at risk if the U.S. were to board foreign flag vessels on the high seas without flag state consent. Risking the right of freedom of navigation worldwide would seriously impinge on the national security requirements of the United States to use the world's oceans to transport both military vessels and maritime cargo.

Any theory that would authorize a representative of the United States to board foreign flag vessels on the high seas in violation of international law would be extremely detrimental to the continued existence of a viable system of international law as well. Since the passage of 14 U.S.C. 89, whenever the Congress or Executive branch has enacted specific authority for Coast Guard law enforcement activities on the high seas, both branches have clearly contemplated that the Coast Guard would conduct boardings on the high seas in compliance with international law. The main areas in which this type of authority has been authorized are narcotic trafficking, migrant interdiction, and fisheries law enforcement. In the area of narcotic trafficking, specific additional law enforcement authority has been enacted both by Congress and though bilateral

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[28] Submittal Letter of the Secretary of State to the President, submitting the 1982 United Nations Convention on the Law of the Sea for transmittal to the Senate of September 24, 1994 *in* U.S. Department of State Dispatch Supplement, February 1995, Vol. 6, No.1.

agreements with other nations. The United States has entered into a number of bilateral agreements designed to combat the trafficking of narcotics in the territorial seas and on board flag vessels of foreign states with which the U.S. has such agreements. These bilateral drug agreements are based on Article 108 of LOS and Article 17 of the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances[30] (1988 Narcotics Convention), both of which require flag state consent for the boarding and searching of vessels by another country outside the searching countries contiguous zone. The bilateral agreements to which the U.S. is a party, establish either a presumed consent for U.S. law enforcement actions on a foreign flag state vessel or an expedited process to obtain the flag state consent. The Senate report accompanying the granting of the Senate's advice and consent to the 1988 Narcotics Convention, emphasized the traditional view regarding the need for flag state consent: "Article 17 describes an extensive and well-functioning practice in drug interdiction efforts at sea, based on traditional rules of flag State duty to exercise its jurisdiction and control over ships flying its flag."[31]

The President made a similar statement upon the ratification of the 1995 Agreement for the Implementation of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to Fish Stocks (commonly known as the Straddling Stocks Agreement). The President stated that the Straddling Stocks Agreement "remains faithful to the principle of international law that States other than the flag state may only take fisheries enforcement action against a vessel on the high seas with the consent of the flag state."[32]

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[29] United States v. Williams, 617 F.2d 1063,1098 , ftnt. 10 (citations omitted) (5th Cir. 1980).
[30] The U.S. has ratified the 1988 Narcotics Convention.
[31] Exec. Rept. 101-15.
[32] Sen. Treaty Doc. 104-24

The same adherence to this traditional U.S. policy is also evident in the migrant interdiction arena. Executive Order 12807 grants the Coast Guard the authority to interdict vessels carrying migrants on the high seas. E.O. 12807 explicitly requires that the Coast Guard have flag state consent before interdicting foreign flag vessels on the high seas, directing the Secretary of Transportation to issue instructions to the Coast Guard to enforce the suspension and entry of undocumented aliens into the U.S. by sea, and to interdict any "defined vessel" carrying such aliens. Defined vessels include: (1) vessels registered in the U.S.; (2) vessels owned by a U.S. citizen or U.S. corporation and not registered in a foreign country; (3) stateless vessels or vessels assimilated to statelessness; and (4) vessels of foreign nations with whom the U.S. has arrangements authorizing the U.S. to stop and board such vessels. Furthermore, EO 12807 is clear that it only applies, and may only be used as a basis for interdiction, beyond the U.S. territorial sea (i.e. on the high seas).

On the legislative side, 46 U.S.C. App. 1903 et seq. makes it a crime for any person on board a vessel of the United States, or on board a vessel subject to the jurisdiction of the United States, to knowingly or intentionally manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance. The phrase used in that statute "vessel subject to the jurisdiction of the United States," is the same phrase used in 14 U.S.C. 89 to describe the boundaries of the Coast Guard's authority. Importantly, 46 U.S.C. App. 1903(c)(1)(C) defines a vessel subject to the jurisdiction of the U.S. to include, "a vessel registered in a foreign nation where the flag nation has consented or waived objection to the enforcement of U.S. laws by the United States."[33] The legislative history accompanying the enactment of this statute makes it

[33] Other types of vessels considered vessels subject to the jurisdiction of the U.S. for purposes of 46 U.S.C. App. 1903 et seq. are stateless vessels, vessels in U.S. customs waters and vessels located in the territorial seas of another states where the state has consented to the enforcement of U.S. laws by the United States. 46 U.S.C. App. 1903(c)

clear that Congress did not envision this restriction on U.S. jurisdiction as changing any then existing legal doctrines. "The Committee does not intend for the Coast Guard or other federal agencies to alter their current practices with respect to boarding or seizing vessels at sea as a result of this legislation."[34]

F. The Case of the F/V Jin Yinn No. 1

The interdiction of the F/V Jin Yinn No. 1 by the U.S. Coast Guard for smuggling aliens has been used as an example to support the legal interpretation that the Coast Guard has authority that would allow it to board, search, and seize foreign flag vessels without the consent of the flag state. Proponents of the argument that the Coast Guard has this broad authority point to the lack of prosecution of the smugglers aboard the F/V Jin Yinn by Taiwan (the flag state) despite assurances from Taiwan to the U.S. that the smugglers would be prosecuted as proof that a broad exertion of U.S. authority is necessary to ensure successful prosecutions of alien smuggling cases. The circumstances surrounding the interdiction of the F/V Jin Yinn, however, highlight the international law and policy concerns with the over-expansive interpretation of the Coast Guard authority.

The F/V Jin Yinn was first spotted by the Coast Guard approximately 250 miles off the coast of California.[35] Based on intelligence information, the Coast Guard suspected that the F/V Jin Yinn was involved in alien smuggling. The F/V Jin Yinn avoided all attempts by the Coast Guard cutter on scene to communicate (including attempted contact in both English and Mandarin by radio, flag hoist, flashing light, loud hailer, message dropped from Coast Guard

[34] 1986 U.S. Code Congressional and Administrative News, 5986, 6000-6001.

helicopter onto deck of the vessel, and approaches by a Coast Guard small boat). Based on the name and home port of the vessel (visible on the side), the Coast Guard believed the vessel to be registered in Taiwan. The United States requested Taiwan to confirm registry of the vessel and consent to board and search the vessel. Within twelve hours of the request, Taiwan had confirmed registry and granted the United States permission to board and search the vessel only. The Coast Guard immediately informed the F/V Jin Yinn of Taiwan's consent, but the vessel continued to refuse to stop. Four days later, after repeated attempts to communicate and requests to stop, the F/V Jin Yinn allowed the Coast Guard to board. Once on board, the Coast Guard found a large number of People's Republic of China (PRC) national aliens and a crew that was composed of both PRC and Taiwanese nationals. After somewhat lengthy diplomatic discussions between the U.S and Taiwan as well as discussions between the U.S. and PRC, Taiwan agreed to pay for most of the cost of repatriation for the aliens on board. The PRC government also agreed to assist with the costs of repatriation. The United States then requested consent of the Taiwanese to arrest and prosecute the Taiwanese members of the crew under United States law. The same request was made to the PRC government regarding those members of the crew who were PRC nationals. Taiwan eventually told the United States government that it desired to prosecute the Taiwanese national crewmembers itself. The PRC government agreed to prosecute those crew who were PRC nationals.

For the United States to have arrested and prosecuted the crew under U.S. law in light of these developments would have been a violation of international law. The name and home port of the vessel provided evidence that the vessel was registered in Taiwan. Under customary

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[35] The following description of the events surrounding the interdiction of the F/V Jin Yinn are based on internal Coast Guard situation reports which the author reviewed as part of her official duties as a staff attorney with the Coast Guard's Office of Maritime and International Law.

international law, aside from the limited numbers of exceptions discussed above, a vessel on the high seas is under the exclusive jurisdiction of the flag state. Therefore, there are only three ways the United States government may legally exercise law enforcement jurisdiction over a vessel on the high seas:[36] the vessel is registered in the United States, the vessel is stateless, or the flag state of the vessel consents to law enforcement actions by the United States. There was no reason to believe that the F/V Jin Yinn was registered in the United States. There was, however, evidence that the vessel was registered in Taiwan, thus the United States was precluded from declaring the vessel stateless without first inquiring of Taiwan whether the F/V Jin Yinn was legitimately registered in Taiwan. Under international law, once Taiwan confirmed that the F/V Jin Yinn was legitimately registered, the United States only had authority to take law enforcement actions consented to by Taiwan.

The original communication from Taiwan granted consent for U.S. personnel to board and search the vessel. If the United States at that point had exceeded the consent granted, e.g. had arrested the crew and transported them to the U.S. for prosecution, the United States would have been in violation of international law. The violation would have been more flagrant if such actions was taken after Taiwan specifically told the U.S. that they wished to prosecute (and therefore did not consent to the application of U.S. law). Additionally, such an action would have made it more likely that, in future migrant cases involving Taiwanese vessels or migrants, Taiwan would be uncooperative with the U.S. government. Repatriating PRC nationals is an expensive and lengthy process. Although the U.S. government frequently requests the flag state of the vessel on which PRC migrants are discovered to pay for part of the repatriation, typically it

[36] The master of a vessel can consent to a boarding and search of a vessel, but cannot "waive" jurisdiction of the flag state and thus the master cannot consent to being arrested and prosecuted under the laws of a different state then the flag state.

is the U.S. government who foots the bill. For the U.S. to have acted in direct disagreement with the scope of consent of Taiwan in this case, especially in light of the fact that Taiwan was cooperating with the U.S. and assisting in paying the repatriation costs, would have resulted in the likely refusal by Taiwan to fund the repatriation of migrants in future cases.

G Conclusion

The Coast Guard is legally bound to conduct law enforcement activity in compliance with the laws of the United States and international law. Regardless of the extent of Coast Guard authority to enforce U.S. law on the high seas pursuant to 14 U.S.C. 89, the actions of the U.S. Coast Guard are also governed by the restrictions on its authority under international law. On the high seas, under international law the Coast Guard has the authority to enforce U.S. laws that apply extraterritorially only on board U.S. vessels, stateless vessels, and vessels where the flag state has consented to the actions of the United States. The only exceptions to these three categories are foreign vessels over which the Coast Guard asserts jurisdiction based on hot pursuit, constructive presence, or any other type of action covered by international law, such as piracy or slavery. If the United States were to exert jurisdiction over a foreign flag vessel on the high seas outside of the regime described, the United States would be violating the cardinal principles of exclusive flag state jurisdiction and freedom of navigation.

In addition to violating international law, the boarding of a foreign flag vessel on the high seas without the consent of the flag state, unless an exception under international law exists, would be a bad policy decision by the United States. Once the United States decides that it has the authority to enforce U.S. law on the high seas without considering its scope of authority under international law, the United States will have a difficult time protesting the enforcement of

a foreign state's laws on a U.S. registered vessel on the high seas if the enforcement is done in violation of international law principles, i.e. without the consent of the U.S. government. Freedom of navigation on the high seas is too important a right to jeopardize solely for the hope of a possible prosecution of suspected criminals. Generally, flag states of vessels engaging in illegal activity either understand the responsibility of a flag state to police its own vessels and would be insulted if the U.S. unilaterally usurped this role, or have no desire to take any action and are more than willing, if requested, to let the Untied States take whatever action it desires. In either case, if the United States were to take law enforcement action on a foreign flag vessel without flag state consent, the United States would lose the goodwill of the flag state and any hope of cooperation in future cases. Additionally, if the U.S. opens the door to allow law enforcement actions on the high seas without flag state consent, the United States would be taking a significant risk of jeopardizing its long term national security interests in maintaining a high seas regime that regards freedom of navigation as a fundamental foundation of international maritime law.